IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN G. OTSYULA,

Plaintiff,

vs.

INTEL CORPORATION,

Defendant.

Civil No. 05-1449-AA
OPINION AND ORDER

John G. Otsyula
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Plaintiff appearing Pro Se

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Attorneys for defendant

AIKEN, Judge:

Defendant filed a renewed motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Defendant's

motion is denied.

BACKGROUND

Plaintiff, a former Intel Corporation employee, was terminated effective December 31, 2004. On September 19, 2005, plaintiff, appearing pro se, filed a complaint in this court. On September 20, 2005, plaintiff mailed the Summons and Complaint to defendant via certified mail. The complaint, in its entirety, alleged as follows:

> I am filing a complaint for violation of Title VII of the Civil Rights Act. I was retaliated against for complaining about discriminatory acts in the workplace. The employer (Intel) retaliated against me with termination. As a result I lost approximately $15,000 in wages, incurred medical expenses, and suffered emotional damages.

Complaint, p. 1.

Defendant filed a motion to dismiss, or alternatively a motion to make more definite and certain. This court denied defendant's motion to dismiss with leave to renew, and granted defendant's alternate motion for more definite statement allowing plaintiff twenty days to file any amended complaint. The court specified that plaintiff should "identify the alleged 'discriminatory acts,' the nature of the 'discriminatory acts,' and date and time of the 'discriminatory acts,' to whom plaintiff's complaint was made, and the facts that support the casual link between plaintiff's complaint and the adverse employment action." Opinion and Order (Dec. 13, 2005), p. 4.

The court also ordered plaintiff to timely file and properly serve on the defendant an amended complaint containing these factual allegations, or be subject to dismissal. Id.

On December 27, 2005, plaintiff mailed to defendant's counsel a copy of plaintiff's amended complaint. On December 29, 2005 (doc. 22), the court filed plaintiff's amended complaint.

STANDARDS

Under Fed. R. Civ. P. 12(b)(6), dismissal for failure to state a claim is proper only when it appears to a certainty that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

Defendant again moves to dismiss plaintiff's amended complaint alleging that it fails to state a claim for relief. To state a Title VII retaliation claim, plaintiff must allege that he was: (1) engaged in a protected activity; (2) subjected to an adverse employment action; and (3) that there was a casual link between the protected activity and adverse employment action. Morgan v. Nat'l RR Passenger Corp., 232 F.3d 1008, 1017 (9th Cir.

2000).

Plaintiff's amended complaint alleges that after plaintiff's hire by the defendant in 2000 as a Facilities Technician II, in March 2002, he was promoted to Facilities Technician III due to his "outstanding work." In April 2002, plaintiff's then-manager announced plaintiff's promotion to Technician III at a team meeting. Plaintiff alleges that a fellow team member, Kay Chapman, became angry at plaintiff's promotion and "alienated plaintiff from the rest of the team." Chapman then rated plaintiff poorly. Plaintiff alleges that his manager used Chapman's "poor" rating to justify the "Below Expectation" performance rating that plaintiff ultimately received prior to termination.

In August 2002, plaintiff received a performance review "which recognized his valued performance." In October 2002, plaintiff obtained his Masters degree in public administration, specializing in environmental services. Plaintiff approached his manager about increasing his grade level based on his work experience and education. Despite the employer's "grade level chart" ("U.S. Nonexempt Technical Leveling Criteria") which supported a grade increase for plaintiff, management refused to do so.

In January 2003, plaintiff joined the newly formed Instrumentation team. On February 21, 2003, "[d]uring a

discussion between plaintiff and Menard [the Instrumentation Team Senior Technician] on instrument calibration, plaintiff suggested that the procedure needed to be documented and standardized. Menard responded by moving his chair to within two feet of plaintiff's chair, shaking his finger in plaintiff's face, and yelling at plaintiff, "This is tribal knowledge! I don't want to hear any more tribal knowledge!"

In March 2003, plaintiff's manager changed his job and removed him from "Instrument analyzers and assigned him to do temperature analyzer." Plaintiff alleges that the defendant failed to provide adequate training for this change and "set him up to fail." Plaintiff then requested a promotion to Facilities Technician IV, which was rejected due to a performance rating of "Below Expectation" that plaintiff received from his manager after his request for a promotion. Plaintiff alleges that his "corporate services individual development plan" was reviewed with his manager and "nearly every item was marked as 100% completed, giving him an overall grade of 96%." Plaintiff was told that despite his overall rating of 96%, it was his "lack of teamwork" that caused his "Below Expectation" rating.

On April 6, 2003, plaintiff filed a complaint against his manager with defendant's Human Resources Department regarding his "Below Expectation" rating which plaintiff alleges he received

due to his race[1]. The Human Resources investigator dismissed the case.

On April 7, 2003, plaintiff's attorney wrote a formal letter to the defendant outlining plaintiff's various charges of discrimination "based on race and/or national origin."

In April 2003, plaintiff's services were critical to obtaining the ISO certification because ISO requires that a UPW Level III Technician be on the team to support analyzer instrumentation. Plaintiff was the only member of the Instrumentation team who was a UPW Level III Technician. "As soon as the ISO certification was completed, Kilian (team manager) removed the plaintiff from working with analyzers."

In July 2003, "plaintiff took a course on HVAC Level 2 instrument control certification through the employer's enterprise-wide training program. The trainer was from a group unrelated to the Instrument team and had no previous experience with the plaintiff. The plaintiff passed with a very high score. During this time period, the plaintiff was struggling to pass HVAC Level I instrument control certification from his co-workers because they refused to train him."

In August 2003, plaintiff applied for an engineering position. Plaintiff was denied the position because Kilian had given him a "Below Expectations" rating and review.

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[1] Plaintiff is of African descent, specifically from Kenya.

In September 2003, plaintiff appealed the Human Resources decision. The case was investigated and again dismissed.

In October 2003, Kilian did not allow plaintiff to continue to work with Bruce Brines. Plaintiff alleges that Ryan Menard, Instrumentation Team Supervisor, and Tina Menard, Instrumentation Team Engineer, asked Kilian's supervisor, Wayne Potter, to force Kilian to fire Bruce Brines. Plaintiff alleges that Kilian gave Brines two quick written warnings and "forced him to quit for supporting the plaintiff."

In October 2003, during an Instrumentation team meeting, Kilian and team member, Pete Tenney, expressed that they planned to use "the good old boy network" to reorganize the team.

In December 2003, plaintiff was "put on medical leave by a doctor and psychologist due to the hostile working environment created by plaintiff's employer." Plaintiff's doctor and psychologist "did not release [the plaintiff] to return to work unless the work environment improved and it had not improved at the time of termination." Plaintiff alleges that the "employer's own psychiatrist" who examined plaintiff in August 2004, "agreed that the work environment could not be ruled out as contributing to the plaintiff's condition."

Finally, in December 2004, after not working for the defendant for one year, plaintiff was terminated.

Plaintiff alleges that he was one of three employees of

"African descent" in a group of over 186 employees, and that plaintiff's "team senior technician" and coworkers subjected plaintiff to the terms "monkey" and "tribal knowledge" to intimidate and harass him. Plaintiff alleges that these racial terms and statements directed at him by his manager and coworkers were evidence that the work environment was "not congenial" to him, and that "at least three team members had already demonstrated personal biases against him." Finally, plaintiff alleges that the race discrimination complaint he filed with the Equal Opportunity Employment Commission (EEOC) resulting in the EEOC issuing a "right to sue letter," was a "motivating factor" in defendant's retaliation process, ultimately resulting in plaintiff's termination.

The court acknowledges Rule 12(b)(6)'s standards: to liberally construe the complaint in plaintiff's favor and take all allegations as true. Given those standards, along with plaintiff's pro se status, plaintiff's amended complaint states sufficient allegations to form the basis of a Title VII race discrimination claim.

I find that plaintiff has alleged sufficient facts that he was engaged in a protected activity, and to support a casual link between the alleged protected activity and the adverse employment action. The court concedes that this complaint is perhaps not as well articulated as if plaintiff were represented by counsel,

however, it meets the minimum standards of Fed. R. Civ. P. 12(b) and states a claim for relief.

Regarding defendant's other arguments, I find that plaintiff's service of the amended complaint on defendant's counsel of record is sufficient. Plaintiff initially attempted to comply with Rule 4 when he sent by certified mail his original summons and complaint to an Intel employee located in California. There is no dispute that defendant and defendant's counsel received timely and actual notice of plaintiff's complaint. Further, in ordering plaintiff to properly serve "defendant" in the December 2005 Opinion and Order, the court intended that notice be accomplished by serving the amended complaint upon defendant's counsel. Defendant does not dispute receiving timely and actual notice of plaintiff's amended complaint, and the court finds no showing or evidence of prejudice or confusion by the defendant, therefore, the court declines to require pro se plaintiff to now technically comply with Rule 4 by also serving the defendant company with a copy of the amended complaint and summons. See generally, Borzeka v. Heckler, 739 F.2d 444, 447 (9th Cir. 1984)(pro se plaintiff's failure to comply with the personal service requirement under Rule 4 does not require dismissal of the complaint if (a) the party to be personally served received actual notice; (b) the defendant would suffer no prejudice from the defect in service; (c) there is justifiable

excuse for the failure to serve properly; and (d) the plaintiff would be severely prejudiced if the complaint were dismissed).

Finally, regarding defendant's request to strike plaintiff's amended complaint because it has not been properly signed, the court agrees and therefore gives plaintiff ten (10) days to file a properly signed amended complaint. See Fed. R. Civ. P. 11(a).

CONCLUSION

Defendant's renewed motion to dismiss (doc. 23) is denied, however, plaintiff has ten (10) days from the date of this Order to properly sign and file his amended complaint.

Plaintiff's request for discovery (docs. 25) is denied as premature. The defendant has indicated to this court and plaintiff that it fully intends to cooperate with discovery. The court finds no need to interfere in the parties' discovery process at this juncture.

IT IS SO ORDERED.

Dated this 28 day of ~~March~~ February 2006.

Ann Aiken
United States District Judge